84-1185

Office-Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1984

PETER S. RAZATOS,

Petitioner,

v.

THE COLORADO SUPREME COURT, P.V. HODGES, R.B. LEE, W.H. ERICKSON, L.D. ROVIRA, G.E. LOHR, J.E. DUBOFSKY, and J.R. QUINN, in their official capacities as Justices of the Colorado Supreme Court,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JONATHON B. CHASE
P.O. Box 96
South Royalton, VT 05068
802-763-8303
Counsel for Petitioner

OF COUNSEL:
Albert T. Frantz
143 Union Boulevard
Lakewood, CO 80228

QUESTION PRESENTED

Does the Colorado Supreme Court, while retaining for itself the final power and responsibility as factfinder, deny due process by adopting and operating under a rule of procedure, Rule 252, Colo. R. Civ. P. (1973), permitting it to suspend someone from the practice of law and hold him up to public obloquy without itself observing the witnesses in a case that turns on credibility?

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 3

RULE AT ISSUE 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 9

APPENDIX

Decision of the United States Court of Appeals for the Tenth Circuit ..... A

Decision of the District Court ..... B

Rules 247-52, Colo. R. Civ. P. (1973) C

TABLE OF AUTHORITIES

CASES Page

Califano v. Yamasaki, 442 U. S. 682 (1979) 8, 9

Goldberg v. Kelly, 397 U.S. 254 (1970) 9

Gray Panthers v. Schweiker, 652 F.2d 146 (D.C. Cir. 1981) 9

Landon v. Plasencia, 459 U.S. 21, 33 (1982) 9

Mathews v. Eldridge, 424 U.S. 319 (1976) 9

Morgan v. United States, 298 U.S. 468, 481 (1936) 11

People v. Razatos, 636 P.2d 666 (1981) 3

Razatos v. Colorado, 455 U.S. 930 (1982) 5

United States v. Raddatz, 447 U.S. 667 (1980) 6,7,8,9,11

STATUTES

28 U.S.C. § 636(b)(1)(B) (1982) 6
28 U.S.C. § 1254(1) (1982) 3
28 U.S.C. § 1331 (1982) 5
28 U.S.C. § 1343(3) (1982) 5
42 U.S.C. § 1983 (1982) 5

RULES Page

Rule 247, Colo. R. Civ. P. (1973) 3
Rule 248, Colo. R. Civ. P. (1973) 3
Rule 249, Colo. R. Civ. P. (1973) 3,5,6
Rule 251, Colo. R. Civ. P. (1973) 3,5,6
Rule 252, Colo. R. Civ. P. (1973) 3,5,6

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 746 F.2d 1429 (10th Cir. 1984 and appears in the Appendix hereto, at pp. A-1 - A-14. The opinion of the United States District Court for the District of Colorado is reported at 549 F. Supp. 798 (D. Colo. 1982) and appears also in the Appendix hereto, pp. B-1 - B-6.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on October 29, 1984, and this petition for certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

RULE AT ISSUE

Rule 252, Colorado Rules of Civil Procedure (1973)

The text of Rule 252, as well as that of other relevant Rules, is set out verbatim in the Appendix hereto, pp. C-1 - C-7. (The rules were repealed effective January 1, 1982, and were replaced by Rules 241.1 through 241.25. 7A Colo. Rev. Stat., Colo. R. Cir. P. 241.1-241.25 (Supp. 1983). The procedures, however, remain substantially similar.)

STATEMENT OF THE CASE

Pursuant to Rule 247, Colo. R. Civ. P. (1973), petitioner herein, Peter Razatos, was formally charged with four counts of professional misconduct. Mr. Razatos duly filed an answer pursuant to Rule 248, Colo. R. Civ. P. (1973), denying the charges and the matter was referred to a three-member Hearings Committee for formal hearing, as required by Rule 249, Colo. R. Civ. P. (1973).

At the conclusion of the hearing the Hearings Committee submitted its report in which it found appellant guilty of the charges and recommended three years' suspension from the practice of law. Then, pursuant to Rule 251, Colo. R. Civ. P. (1973), these findings and recommendations were submitted for approval or disapproval to a nine-member Hearings Panel, of which the three-member Hearings Committee was a part.

A majority of the Hearings Panel approved the findings and recommendations of the Committee, which findings and recommendations then became the report of the Hearings Panel. The report of the Hearings Panel was then forwarded to the Colorado Supreme Court, which adopted its recommendations in a decision on June 22, 1981. *People v. Razatos*, 636 P.2d 666 (1981).

The charges of professional misconduct against Mr. Razatos all arose out of a transaction involving the purchase and sale of a bar to a Mrs. Smith, the complainant against Mr. Razatos in the disciplinary proceedings. Mr. Razatos, who is a licensed real estate broker as well as an attorney, claimed that throughout the transaction in question he was not acting as Mrs. Smith's attorney but as a real estate broker and she could not reasonably have thought otherwise. Mrs. Smith, on the other hand, claimed that throughout she reasonably thought Mr. Razatos was acting as her attorney. Her claim was supported by the testimony of an attorney referred to in the Colorado Supreme Court's decision as Mr. Black, who had an office- and fee-sharing arrangement with Mr. Razatos and who had been retained by Mrs. Smith to represent her at the closing. Mr. Black's relationship with Mr. Razatos was terminated in March of 1977 "as a result of disagreements." Mr. Black thereafter assisted Mrs. Smith in requesting disciplinary action against Mr. Razatos. Mrs. Smith's claim that she reasonably thought Mr. Razatos was acting as her attorney also received some slight support from the testimony of another attorney, Mr. Pollack, who was representing his father in the transaction, the landlord and lienholder.

At the hearing the undisputed testimony revealed that Mrs. Smith knew that Mr. Razatos was both an attorney and a real estate broker and that her last association with him as an attorney had been in 1969. It was conceded that she contacted Mr. Razatos in 1975, not as an attorney, but to see if he knew of any bars for sale. She further conceded that she knew Mr. Razatos was the attorney for parties about to initiate foreclosure proceedings on the bar she ultimately bought. It was also undisputed that it was Mr. Razatos' suggestion that Mrs. Smith be represented by counsel in forming The Spigot, Inc., the bar's corporate name, and at the closing. She then retained Mr. Black, who had previously represented her husband, to represent her. There was, of course, some testimony and evidence supporting Mrs. Smith's claim that she thought Mr. Razatos was acting as her attorney; but this is the undisputed setting in which this claim arose.

In the proceeding before the Colorado Supreme Court Mr. Razatos argued that Rules 249 and 251, Colo. R. Civ. P. (1973), denied him due process in permitting the nine-person Hearings Panel to make the final determination of fact when only three of its members, those constituting the Hearings Committee, observed the witnesses and the remaining six did not even have access to a transcript. The People took the position that under Colorado law it was not the nine-member Hearings Panel that was the final factfinder but the Colorado Supreme Court, which had access to a full transcript. The constitutional argument was not even addressed by the Colorado Supreme Court in its decision of June 11, 1981, suspending Mr. Razatos from the practice of law. The decision of the Colorado Supreme Court was appealed to this Court, which denied the appeal. *Razatos v. Colorado*, 455 U.S. 930 (1982).

Thereafter, Petitioner commenced this action in federal court against the Colorado Supreme Court and the justices thereof, accepting the position of the People in the disciplinary proceeding that the Colorado Supreme Court is the final factfinder, but arguing that Rule 252, Colo. R. Civ. P. (1973), as so construed, denied him due process. Petitioner's claim was based on 42 U.S.C. § 1983 (1982), and jurisdiction in the district court was predicated upon 28 U.S.C. §§ 1331 and 1343(3), (1982). The relief now bring sought is a hearing to clear petitioner's name. The district court dismissed the complaint on the alternative grounds that it lacked subject matter jurisdiction and that the complaint failed to state a claim upon which relief can be granted. 549 F. Supp. 798. The United States Court of Appeals for the Tenth Circuit reversed the decision below with respect to jurisdiction but affirmed on the merits. 746 F.2d 1429. Petitioner seeks review of the decision of the United States Court of Appeals for the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

Under what circumstances due process requires the factfinder to observe personally the witnesses is an important question of federal law which has not been, but should be, settled by this Court.

The Colorado Supreme Court has retained for itself the final power and responsibility to find the facts in attorney disciplinary proceedings. The allegations in the Amended Complaint, accepted as true by the Court of Appeals, state in paragraph 8, the Colorado "Supreme Court has the final power and responsibility to determine the facts and to impose appropriate sanctions." Although the Colorado Supreme Court might have delegated the responsibility of finding the facts to the Hearings Committee, see Rule 249, Colo. R. Civ. P. (1973), subject to appellate review of the sufficiency of the evidence to support the findings, it did not. Instead, the findings and recommendations of the Hearings Committee, as approved and adopted by the Hearings Panel, see Rule 251, Colo R. Civ. P. (1973), become, in addition to the transcript of the proceedings before the Hearings Committee, see Rule 252, Colo. R. Civ. P. (1973), the evidence upon which the Colorado Supreme Court relies in making its final determinations of fact and imposing discipline or dismissing the complaint. There is no requirement in a case which turns on the credibility of witnesses—as is the case here—that the Colorado Supreme Court personally observe the witnesses. It is the failure of the rules to so provide that petitioner contends denies him due process.

In upholding the constitutionality of the Colorado rules, the Court of Appeals for the Tenth Circuit relied exclusively on this Court's decision in *United States v. Raddatz*, 447 U.S. 667 (1980). Under review in *Raddatz* was a provision of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B) (1982), which permitted a district court to refer a suppression motion to a magistrate and authorized the district court to decide the motion based on the record developed before the magistrate, including the magistrate's proposed findings and recommendations. Notwithstanding the statutory requirement that the district court itself make a "de novo determination" of disputed portions of the magistrate's proposed findings and recommendations in suppression motions, a closely divided Court held that neither the statute nor the Due Process Clause of the Fifth Amendment required a de novo *hearing* before the district court, even when questions of credibility were critical.

Recognizing that the Colorado Supreme Court also has responsibility for making a de novo *determination* of contested facts, the Court of Appeals, relying on *Raddatz*, held in this case that there is no requirement under the Due Process Clause of the Fourteenth Amendment for a de novo *hearing* before the final factfinder, the Colorado Supreme Court, even when the case turns on credibility of witnesses.

There are, however, two critical distinctions between the nature of the hearing in *Raddatz* and that of the disciplinary proceeding at issue here, distinctions which tip the due process balance in favor of a de novo hearing before the factfinder. First, the Court in *Raddatz* was careful to recognize "that the interests underlying a voluntariness hearing do not coincide with the criminal law objective of determining guilt or innocence," 447 U.S. at 678, "that the interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself" and "that the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself." 447 U.S. at 679.

Petitioner does not here take the position that a bar disciplinary proceeding is in all circumstances to be regarded as a criminal proceeding or that due process demands the same procedural safeguards in a bar disciplinary proceeding that would be required in a criminal proceeding. He does, however, take the position that a disciplinary proceeding is more like a criminal proceeding than is a suppression hearing and that personal observation of witnesses is required by due process when the outcome of the proceeding turns on witness credibility, as it does in this case.

The Court of Appeals itself recognized that bar disciplinary "proceedings are 'quasi-criminal' in nature," 746 F.2d at 1435 and that since they "deprive an attorney of the right to earn a livelihood, 'an analogy to the criminal law is appropriate.'" *Id.* It concluded, however, "that an attorney's due process interests in a 'quasi-criminal' disciplinary proceeding weigh less than those of a criminal defendant at trial" and that "the process due at an attorney disciplinary hearing may be less elaborate than that afforded a defendant at trial." *Id.* at 1435-36. Although petitioner has no quarrel with this conclusion generally, he does when it is

applied specifically to the right of personal observation of witness credibility. Here the interests underlying the disciplinary proceeding do "coincide with the criminal law objective of determining guilt or innocence," 447 U.S. at 678, and the interests at stake in stripping him of the right to practice his chosen profession and tarnishing his reputation and standing in the community forever require stricter procedural safeguards than those required at a suppression hearing.

The second major distinction between the nature of the suppression hearing in *Raddatz* and the disciplinary proceeding in this case is that a criminal defendant who loses the suppression hearing "remains free to present evidence and argue to—and may persuade—the jury that the confession was not reliable and therefore should be disregarded." 447 U.S. at 678. In other words, there is the right to have the ultimate decisionmaker personally observe the witnesses to determine credibility in the hearing at which guilt or innocence is decided. The suppression hearing is merely a preliminary hearing, a prelude to the trial; but at the trial itself witness credibility on the same issue is determined by the factfinder through personal observation.

This is a critical and fundamental difference between the disciplinary proceedings here at issue. There is no right here to have the ultimate decisionmaker personally observe the witnesses. This proceeding is the final hearing; it is not a prelude to anything. It is it.

Were the Court's closely divided opinion in *Raddatz* the only one in recent years to speak to the issue raised here, petitioner would still have a strong case; but just a year before *Raddatz* this Court, without dissent, held in *Califano v. Yamasaki*, 442 U.S. 682 (1979), that the interests of a recipient of disability benefits under the Social Security Act warranted a personal hearing by the decisionmaker before there could be recoupment of overpayments where the issue to be decided was the "fault" of the recipient in receiving the overpayment. In his decision for the Court, Justice Blackmun noted, at 697:

> We do not see how [fault] can be evaluated absent personal contact between the recipient and the person who

> decides his case. Evaluating fault, like judging detrimental reliance, usually requires an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale. See *Goldberg v. Kelly*, 397 U.S., at 269.

Although ultimately decided on statutory grounds, the statute was so construed to avoid the substantial constitutional question that a contrary construction would have invited, as the citation to *Goldberg v. Kelly*, 397 U.S. 254 (1970), suggests. *Cf. Landon v. Plasencia*, 459 U.S. 21, 33 (1982); *see Gray Panthers v. Schweiker*, 652 F.2d 146 (D.C. Cir. 1981), relying on *Yamasaki* to find a personal hearing by the factfinder constitutionally compelled under similar circumstances.

It must be noted that the private interest implicated in *Yamasaki*, Social Security benefits, is not sufficiently important to require personal hearings in all circumstances, *Mathews v. Eldridge*, 424 U.S. 319 (1976). If, however, the interest is of sufficient importance to require such hearings when questions of fault, including credibility, are at issue, then the interest in practicing one's chosen profession and avoiding the public stigma of suspension must necessarily warrant at least as much.

It is noteworthy that neither this Court, in its decision in *Raddatz*, nor the Court of Appeals in its decision below, made any reference to the decision in *Yamasaki*. Yet it is primarily on this Court's decision in *Yamasaki* that petitioner relies in asserting his right to a personal hearing before the decisionmaker. It is *Yamasaki* that makes clear that notions of fundamental fairness demand that petitioner be afforded the right to have issues of witness credibility determined by the ultimate decisionmaker.

CONCLUSION

The Colorado Supreme Court cannot have it both ways. It cannot retain to itself the final power and responsibility of factfinder but then refuse to observe the witnesses in disciplinary proceedings when the case turns on credibility. It need not be the factfinder. It could, entirely consistent with due process, delegate

fact finding responsiblity to the Hearings Committee or some other neutral tribunal. But it has chosen not to do so and must, then, exercise the authority it has retained consistent with the demands of due process.

The right being asserted here is the right to have the person or persons charged with final fact-finding responsibility observe personally the witnesses and reach its own conclusions with regard to credibility. As long as the Colorado Supreme Court had the power to reverse the findings of the Committee and Panel and find that Mr. Razatos was telling the truth or reach its own conclusion that there was less than clear and convincing evidence to support the claim of the complainant against him, then he was denied his right guaranteed by due process to have those with power to decide to have before them the only evidence which could cause them to exercise that power in his favor—personal observation of the witnesses. If personal observation is critical to decisions regarding credibility, then a decisionmaker without personal observation cannot make such a finding.

Assume that a decisionmaker is responsible for deciding what color an object is. At the hearing there is testimony by one or more persons having seen the object that it is a particular color. At that hearing, however, the person asserting that the color is otherwise is not permitted to have the decisionmaker look at the object. Assuming sufficient other evidence—the testimony of others who had seen it—, the only conceivable basis for rejecting the testimony of those saying it is one color and finding it to be another color would be for the decisionmaker itself to look at the object and decide. Unless there is the opportunity to see, there is not the opportunity to decide. And without the opportunity to decide, there is not a hearing that comports with due process.

Such is the case here. The Colorado Supreme Court is not required to observe the witnesses; and, unless it does, there is no way that it can reject the earlier negative finding and find in favor of Mr. Razatos. At his "due process" hearing Mr. Razatos was not permitted to put before the decisionmaker the only evidence upon which it could find in his favor. It is the hearing *before the Colorado Supreme Court* which is here challenged—the hearing which must meet the demands of due process. Whether or not some

other hearing complies with the requirements of due process is irrelevant.

There is a substantial need for this Court to clarify the circumstances in which due process demands that "[t]he one who decides must hear," *Morgan v. United States*, 298 U.S. 468, 481 (1936), to explain when the more rigorous requirements of *Califano v. Yamasaki*, 442 U.S. 682 (1979), are to be followed rather than the more relaxed requirements of *United States v. Raddatz*, 447 U.S. 667 (1980), and what due process standards attach to professional disciplinary "quasi-criminal" proceedings.

Respectfully submitted,

Jonathon B. Chase
P.O. Box 96
South Royalton, VT 05068
COUNSEL FOR PETITIONER

OF COUNSEL:
Albert T. Frantz
143 Union Boulevard
Lakewood, CO 80228

Writ
12/19/84

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

PETER S. RAZATOS,	)	
Plaintiff-Appellant,	)	
v.	)	No. 82-2516
THE COLORADO SUPREME COURT,	)	
P. V. HODGES, R. B. LEE,	)	
W. H. ERICKSON, L. D. ROVIRA,	)	
G. E. LOHR, J. E. DUBOFSKY, and	)	
J. R. QUINN, in their official capacities	)	
as Justices of the Colorado	)	
Supreme Court,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
For the District of Colorado
(D.C. No. 82-Z-632)

Jonathon B. Chase (Albert T. Frantz, Lakewood, Colorado, with him on the brief), South Royalton, Vermont, for Plaintiff-Appellant.

Ruthanne Gartland, Assistant Attorney General for the State of Colorado (Duane Woodard, Attorney General; Charles B. Howe, Deputy Attorney General; Joel W. Cantrick, Solicitor

General; and Jill A. Gross, Assistant Attorney General, on the brief), Denver, Colorado, for Defendants-Appellees.

Before SETH, SEYMOUR, and ANDERSON,* Circuit Judges.

SEYMOUR, Circuit Judge.

---

*Honorable Aldon J. Anderson, United States District Judge for the District of Utah, sitting by designation.

Peter Razatos, an attorney suspended from practice by the Colorado Supreme Court, brought this action under 42 U.S.C. § 1983 (1982). He seeks a declaratory judgment that the Colorado procedure for disciplining attorneys violates the Due Process Clause of the Fourteenth Amendment, and a hearing to clear his name. He asserts that under the Colorado attorney discipline scheme, the Colorado Supreme Court makes the final fact determination as to whether an attorney should be disciplined. He argues that this scheme violates the Fourteenth Amendment because due process requires that a personal hearing be held before the final decision-maker. The district court granted defendants' motion to dismiss for lack of subject matter jurisdiction. *Razatos v. Colorado Supreme Court*, 549 F. Supp. 798 (D. Colo. 1982). It held alternatively that even if it had jurisdiction, the Colorado procedure does not violate due process. We disagree on the jurisdictional issue, but we affirm the judgment on the merits.

I.

BACKGROUND

A. *Attorney Disciplinary Proceedings in Colorado*

The Colorado Supreme Court has adopted rules governing the procedures by which disciplinary proceedings may be brought against attorneys in Colorado. At all times relevant to this case, those rules were embodied in Rules 241 through 259 of the Colorado Rules of Civil Procedure, 7A Colo. Rev. Stat. (1973).[1] The rules establish a nineteen-member Grievance Committee, which is divided into two Hearings Panels of nine members each, *see* Rule 243, with the remaining member appointed as Grievance Committee Chairman. *See* Rule 242. When a formal complaint is brought against an attorney, it is assigned to one of the nine-member Hearings Panels. The Grievance Committee Chairman then appoints a three-member Hearings Committee consisting of at least one member of the panel assigned to that complaint. *See* Rule 249. The committee conducts a formal hearing during which witnesses are sworn, testimony is taken, and a complete record is made. *Id.* At the conclusion of the hearing, the committee submits to the panel a report signed by a majority of the committee setting forth its findings and recommendations. *See* Rule 251. If approved by a majority of the panel, the findings and recommendations of the committee are adopted in the panel's report. When the panel finds that the charges are proven, it recommends appropriate disciplinary action to the Colorado Supreme Court. *Id.* When the charges are unproven, the panel is required to dismiss the complainant, and the matter is terminated unless the complainant petitions the Colorado Supreme Court to review the dismissal. *Id.*

---

[1]The rules were repealed effective January 1, 1982, and were replaced by Rules 241.1 through 241.25. 7A Colo. Rev. Stat., Colo. R. Civ. P. 241.1-241.25 (Supp. 1983). However, we note that the hearing procedure remains substantially similar.

In cases where the panel decides to recommend discipline, it is required to file its report, findings, and recommendations with the Colorado Supreme Court. *See* Rule 252. The respondent attorney is provided an opportunity to file exceptions to the panel's report, after which the parties may designate portions of the record and file briefs. The matter stands submitted to the court on the briefs and on the designated record. The court must then determine the matter promptly and impose discipline or dismiss the complaint. *Id.*

B. *Razatos' Case*

Upon review of a trial court's order of dismissal, we must assume that the facts alleged in the complaint are true. *Poolaw v. City of Anadarko*, 660 F.2d 459, 461 (10th Cir. 1981); *Bryan v. Stillwater Board of Realtors*, 578 F.2d 1319, 1321 (10th Cir. 1977). Razatos' complaint, as amended, states as follows:

> "In 1975, plaintiff Razatos, who was a licensed real estate broker as well as an attorney, was approached by Mrs. Dorothy Lee Smith, who inquired of him if he knew of any bars for sale. Mr. Razatos thereafter assisted Mrs. Smith in the purchase of a bar then called the Littleton Lounge. Mrs. Smith eventually charged Mr. Razatos with professional misconduct in the course of these transactions and these charges ultimately led to plaintiff Razatos' suspension from the practice of law for a period of three years, the conduct complained of in this action. The critical issue central to the disciplinary proceedings was whether plaintiff Razatos was representing Mrs. Smith in these transactions as her attorney, as she claimed, or merely acting in his capacity as real estate broker, as he claimed. The credibility of several witnesses, including Mrs. Smith and Mr. Razatos, was a critical factor in making the final determination of Mr. Razatos' role in these transactions."

Rec., Vol. I, at 7.

The charges against Mr. Razatos were first heard by a three-member Hearings Committee. All three members of the committee were also in the nine-member Hearings Panel assigned to the

complaint. After a formal hearing during which witnesses testified and other evidence was produced, the committee found Razatos guilty and recommended suspension from practice for three years. It submitted its findings and recommendations to the nine-member panel, a majority of which approved them. The findings and recommendations of the committee thus became the report of the panel. The panel then referred its report to the Colorado Supreme Court. The court, upon a review of the record, was persuaded "that the material findings of fact reflected in [the panel's] report are supported by clear and convincing evidence and that the recommendations for discipline are appropriate." *People v. Razatos*, 636 P.2d 666, 667 (1981). Accordingly, the court adopted the panel's recommendations and suspended Razatos for three years. Razatos appealed the court's decision to the United States Supreme Court, which denied the appeal. *Razatos v. Colorado*, 455 U.S. 930 (1982).

Razatos thereafter commenced this section 1983 action in federal district court against the Colorado Supreme Court and its justices. In the prior state proceedings, Razatos had contended that Rules 249 and 251 of the Colorado Rules of Civil Procedure denied him due process because they permitted the nine-member panel to make the final determination of facts when only three of its members (those appointed to the Hearings Committee) actually observed the witnesses, and the remaining six members allegedly did not have a transcript of the committee hearing. The State took the position that under Colorado law, the Colorado Supreme Court was the final fact-finder in disciplinary proceedings, rather than the nine-member Hearings Panel as asserted by Razatos. The Colorado Supreme Court did not address this argument in its opinion.

In his section 1983 claim, Razatos accepts the position of the State that the Colorado Supreme Court is the final fact-finder under the rules. Relying on *United States v. Raddatz*, 447 U.S. 667 (1980), he asserts that Rule 252, as so construed, violates due process. Razatos claims that in cases where credibility of witnesses is crucial to the decision, the final arbiters of fact must see the witnesses and have an opportunity themselves to assess credibility in order to satisfy due process. The district court dismissed the

complaint for lack of subject matter jurisdiction and, alternatively, on the ground that Rule 252 does not violate due process.

II.
JURISDICTION

A United States District Court has no authority to review final judgments of a state court in judicial proceedings. Such review resides exclusively in the United States Supreme Court. *See* 28 U.S.C. § 1257 (1982); *see also Phelps v. Kansas Supreme Court*, 662 F.2d 649, 651 (10th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982); *Younger v. Colorado State Board of Law Examiners*, 625 F.2d 372, 375 (10th Cir. 1980). Therefore, to the extent Razatos sought review in the district court of the judicial decision of the Colorado Supreme Court, the district court properly refused to hear his complaint.

The Supreme Court has recognized a distinction, however, between a disciplined attorney's challenge to his particular disciplinary proceedings and a generalized constitutional attack on the state's rules and regulations governing discipline. In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), the Court said that in the latter kind of case, the district court is not required to review a state court judicial decision but rather to assess the validity of a rule promulgated in a non-judicial proceeding.

> "We have recognized that state supreme courts may act in a nonjudicial capacity in promulgating rules regulating the bar. . . . Challenges to the constitutionality of state bar rules, therefore, do not necessarily require a United States District Court to review a final state-court judgment in a judicial proceeding. Instead, the District Court may simply be asked to assess the validity of a rule promulgated in a nonjudicial proceeding. If this is the case, the District Court is not reviewing a state-court judicial decision. In this regard, 28 U.S.C. § 1257 does not act as a bar to the District Court's consideration of the case and because the pro-

> ceedings giving rise to the rule are nonjudicial the policies prohibiting United States District Court review of final state-court judgments are not implicated. United States District Courts, therefore, have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case."

Feldman, 460 U.S. at 485-86 (citations omitted); *see also, Younger*, 625 F.2d at 376.

District courts are thus required to distinguish between general challenges to state bar rules as promulgated and challenges to state court decisions in particular cases. The distinction is often difficult to draw. The Supreme Court in *Feldman* stated that "[i]f the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to a state bar, then the District Court is in essence being called upon to review the state court decision." *Feldman*, 460 U.S. at 483-84 n.16. Although this language by itself does not provide district courts with a bright line rule, a review of the constitutional challenges over which the Supreme Court permitted jurisdiction in *Feldman* convinces us that jurisdiction over Razatos' claim exists in this case.

Feldman did not attend law school but successfully completed an alternative method of becoming a lawyer in Virginia by following a structured program of study in a practicing attorney's office. He was admitted to the Virginia Bar. However, he was later denied admission to the District of Columbia Bar when the committee on admissions refused to waive the requirement of law school graduation. This decision was upheld by the District of Columbia Court of Appeals, which is the highest court of the district. Feldman thereupon filed a complaint in federal court, alleging that the District of Columbia Court of Appeals' refusal to admit him to the bar violated the Fifth Amendment in five respects. *See Feldman*, 460 U.S. at 469 n.3.

Two of the five allegations required that the district court scrutinize not only the challenged rule itself, but the District of Columbia Court of Appeals' application of the rule to Feldman. In these two allegations, Feldman first claimed that the court of appeals acted arbitrarily and capriciously in denying his petition for waiver because it refused to consider his individual qualifications. Second, he argued that the court acted unreasonably and discriminatorily because it failed to waive the rule in his particular case even though it allegedly had waived the rule in the past under similar circumstances. Although they arguably presented constitutional claims, these two challenges to the state bar rule were held to be "inextricably intertwined" with the state court decision. *Id* at 486–87. In order to resolve them, the district court would have to go beyond mere review of the state rule *as promulgated*, to an examination of the rule *as applied* by the state court to the particular factual circumstances of Feldman's case. Consequently, the district court would be required "to review a final judicial decision of the highest court of a jurisdiction in a particular case." *Id.* at 486. For this reason, the Court concluded that the federal district court did not have jurisdiction over these two elements of Feldman's claim.

The remaining three allegations in Feldman's complaint "involve[d] a general attack on the constitutionality of [the state rule]," *id.* at 487, and the Court held that the district court had subject matter jurisdiction over these elements of Feldman's complaint. In these permitted claims, Feldman contended that the state rule was unconstitutional because (1) it created an irrebuttable presumption that only graduates of accredited law schools are fit to practice law; (2) it discriminated against those who have obtained equivalent legal training by other means; and (3) it impermissibly delegated to the ABA the power of the District of Columbia Court of Appeals to regulate the bar. In order to evaluate these claims, the district court did not have to review the particular judicial decision of the District of Columbia Court of Appeals in Feldman's case. It only had to look at the rule itself as promulgated.

In the case at bar, Razatos contends that under the Colorado rules, the Colorado Supreme Court is the final arbiter of fact in

disciplinary proceedings. He argues from that premise that Colo. R. Civ. P. 252 therefore violates the Due Process Clause because it fails to require the final arbiter of fact to observe the witnesses personally in cases where credibility is a critical factor. In order to evaulate this claim, the district court need not review the decision of the Colorado Supreme Court. It need only look at Rule 252 as promulgated, and as construed by state case law. Razatos framed his constitutional challenge in such a way as to allow district court subject matter jurisdiction. We therefore reverse the district court's decision that it lacked jurisdiction.

III.
RAZATOS' DUE PROCESS CLAIM

The district court held alternatively that "even if plaintiff has framed his claim so that it raises a federal question, this Court . . . concludes that Rule 252 does not constitute a denial of due process." 549 F. Supp. at 801-802. We argee with this conclusion.

To analyze Razatos' claim, we must examine the nature of the disciplinary proceedings at issue. Under this scheme the Colorado Supreme Court exercises "original and exclusive jurisdiction" over the licensing and discipline of all attorneys in the state. Colo. R. Civ. P. 241C. *See Doe v. Pringle*, 550 F.2d 596, 599 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977). In exercising this jurisdiction, the supreme court promulgated the rules which established the Grievance Committee and the procedure that Razatos attacks. It is clear from this structure that the Hearings Panel serves as an adjunct to the supreme court. In this capacity, the Hearings Panel facilitates disciplinary proceedings by conducting hearings, issuing findings of facts, and proposing sanctions to the supreme court. These recommendations are advisory only and the supreme court retains the power to increase or decrease the sanction or to dismiss the complaint. *See* Rule 252B(3) and (6); *see also People v. Mattox*, 639 P.2d 397, 399 (1982); *People v. Berge*, 620 P.2d 23, 28 (1980); *People v. Susman*, 196 Colo. 458, 587 P.2d 782, 786 (1978). This includes the power to review independently the findings of facts and to modify or reverse them if they are not supported by clear and convincing evidence. *See, e.g., Susman*, 587

P.2d at 786 n.4 (citing ABA, *Standards for Lawyer Disciplinary and Disability Proceedings*, Comment to § 8.48 (Tent. Draft 1978); *cf. People v. Razatos*, P.2d 666, 671 (1981); *Berge* 620 P.2d at 28.

Razatos does not challenge this power but asserts that the failure of the rules to provide an opportunity for a de novo hearing before the court necessarily means that the court may not conduct such hearings. Although we have found no case in which the court has chosen to hold a de novo hearing, we cannot say that the court does not have the power to do so. As noted above, the court exercises original and exclusive jurisdiction over the entire proceeding. This plenary power is consistent with the court's "inherent power, apart from rule or statute, as well as the duty" to discipline attorneys. *People v. Radinsky*, 176 Colo. 357, 490 P.2d 951, 952 (1971). *See Susman*, 587 P.2d at 786. It includes the discretionary right to hold de novo hearings whenever necessary to provide due process.[2]

Razatos claims that if the Colorado Supreme Court has the discretionary power to hold de novo hearings, its failure to provide one when issues of credibility are crucial violates an accused attorney's right to have the final decision-maker actually hear the challenged testimony. *See Morgan v. United States*, 298 U.S. 468 (1936). The United States Supreme Court faced a similar issue in *United States v. Raddatz*, 447 U.S. 667 (1980). There, the Court upheld a provision of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B) (1982), which permitted a district court to refer a suppression motion to a magistrate, and authorized the district court to decide the motion based on the record developed before the magistrate, including the magistrate's proposed findings of fact and recommendations. The Court determined that, even when the motion involved contested credibility assessments and was dispositive of the case, a de novo hearing before the district court was required neither statutorily nor constitutionally.[3]

---

[2]In fact, the amended rules expressly recognize that the supreme court's power in disciplinary proceedings is plenary. *See* Colo. R. Civ. P. 241.15(c) (Supp. 1983).

[3]*Raddatz* based his constitutional challenges on the Due Process Clause of the Fifth Amendment and on Article III.

In deciding that the statute did not violate Raddatz's right to procedural due process, the Court balanced the three factors enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): "(a) the private interests implicated; (b) the risk of an erroneous determination by reason of the process accorded and the probable value of added procedural safeguards; and (c) the public interest and administrative burdens, including costs that the additional procedures would involve." *Raddatz*, 447 U.S. at 677. *See Rosewitz v. Latting*, 689 F.2d 175, 177 (10th Cir. 1982).

Razatos asserts an important liberty interest. It is clear that attorney discipline, although designed to protect the public, necessarily imposes a punishment or penalty on a lawyer that entitles him to procedural due process. *In re Ruffalo*, 390 U.S. 544, 550 (1968). Moreover, since these proceedings are "quasi-criminal" in nature, *id.* at 551, *see Phelps* 662 F.2d at 653 (McKay, J., dissenting), and deprive an attorney of the right to earn a livelihood, "an analogy to the criminal law is appropriate." *Id.* Nevertheless, as noted by the Colorado Supreme Court in *People v. Harfmann*, 638 P.2d 745 (1981), the due process rights of an attorney in a disciplinary proceeding "do not extend so far as to guarantee the full panoply of rights afforded to an accused in a criminal case." *Id.* at 747. Recognizing that disciplinary proceedings are *sui generis*, the *Harfmann* court refused to extend the exclusionary rule to protect a lawyer charged in a disciplinary complaint. *Id.*; *see* ABA *Standards* at § 1.2 (quoted in *Harfmann*, 638 P.2d at 748).

In *Raddatz*, the Supreme Court acknowledged that the suppression hearing in question involved contested credibility assessments and would be dispositive of the case. *See Raddatz*, 447 U.S. at 673. Nevertheless, the Court noted that "the interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself." *Id.* at 679. Comparing a hearing before a magistrate to the finding of a special master or administrative hearing officer, *id.* at 680, the Court concluded that the process due at a suppression hearing could be less elaborate than would be necessary at a trial. *Id.* at 679. Although here the challenged disciplinary proceedings are definitely judicial rather than administrative in nature, *see Doe*, 550 F.2d at 599; *cf.*

Feldman, 460 U.S. at 479; *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 433-34 (1982), we believe that an attorney's due process interests in a "quasi-criminal" disciplinary proceeding weigh less than those of a criminal defendant at trial. Accordingly, the process due at an attorney disciplinary hearing may be less elaborate than that afforded a defendant at trial.

We next consider the risk of an erroneous determination and the probable value of additional safeguards, remembering that "the practical concern for accurate results . . . is the focus of the Due Process Clause." *Raddatz*, 447 U.S. at 684 (Blackmun, J., concurring). Here, the possible unreliability of a credibility assessment forms the crux of Razatos' claim. The Colorado Supreme Court accepted without modification the Hearings Panel's findings of fact which were based on the conflicting testimony of the complainant and Razatos.[4] While *Raddatz* involved similar dispositive credibility assessments, Razatos seeks to distinguish his situation on the grounds that a criminal defendant in a suppression hearing has a second chance to suppress the evidence at trial. Findings of fact in the Colorado disciplinary proceedings are, however, reviewed not once but twice. After the Hearings Committee makes a determination, its recommendations are adopted by the Hearings Panel which then files its report with the supreme court. *See* Rule 251A. At that time the attorney facing charges may file exceptions to the recommended findings of fact and proposed sanctions, certify relevant contested portions of

---

[4]We recognize that the opportunity to hear and observe witnesses may be crucial in the appraisal of testimony, *see Wingo v. Wedding*, 418 U.S. 461 (1974), yet "its importance diminishes when facts are developed and inferences . . . drawn without reference to credibility." *Mildner v. Gulotta*, 405 F. Supp. 182, 195 (E.D.N.Y. 1975), *aff'd*, 425 U.S. 901 (1976). "[A] disciplinary hearing is not a full-blown trial, but an inquest — a gathering of facts concerning the *conduct* of an attorney, a subject more likely to be illuminated by the evidence of the attorney's own acts than by what is said or not said by someone else." *Id.* Although we may not examine the nature of the contested testimony in this case, *see Feldman*, 460 U.S. at 486-87, we note that a true "swearing contest," with no objective facts to bolster the credibility of one side or the other, is exceptionally rare. *See Raddatz*, 447 U.S. at 687 & n* (Powell, J., concurring in part and dissenting in part).

the hearing transcript to the court, and extensively brief the issues for the court. *See* Rule 252. The exceptions serve to alert the court to any problems of doubtful credibility. We believe that this kind of scrutiny actually enhances the reliability of the findings. *See Raddatz*, 447 U.S. at 684 (Blackmun, J., concurring).

Moreover, as established above, the supreme court retains the discretion to order a de novo hearing when credibility determinations appear questionable. This plenary authority further extends to ensure the impartiality of the Hearings Panel since its members serve only at the discretion of the court.[5] *See id.* at 685.

Finally, a disciplinary proceeding requires clear and convincing evidence to sustain a finding of fact. *See* Rule 251A. Razatos asserts that this fact indicates a weightier liberty interest than that at stake in *Raddatz*, where the suppression hearing required only a preponderance of the evidence. We agree, and we believe that the clear and convincing evidence test functions to safeguard that interest.

The last factors we must consider are the governmental interests at stake and the burden posed by additional safeguards. As stated by the Colorado Supreme Court in *Harfmann*, 638 P.2d at 747, "the court's primary duty [in disciplinary proceedings] is to protect the public and the legal profession from unscrupulous lawyers." Moreover, "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Feldman*, 460 U.S. at 484 n.16, (*quoting Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)). *See also Middlesex County Ethics Committee*, 457 U.S. at 434-35.

Razatos urges that the requirement of a de novo hearing in instances where credibility of the witnesses is dispositive would not pose a significant burden for the Colorado Supreme Court. Yet we are reluctant to impose even this requirement in light of

[5]Justice Blackmun marshalled these factors to reject Raddatz's Article III challenge. These elements similarly support the reliability of the disciplinary proceeding at issue. Moreover, an attorney in a disciplinary proceeding is heard by his peers, a group that is likely to understand the difficult situations an attorney may face.

the substantial safeguards that currently exist. To do so would frustrate in part the purpose of the adjunct structure, which plainly was designed to free the supreme court from the burden of developing the entire record for adjudication itself. *See Raddatz*, 447 U.S. at 676 n.3.

Our decision is limited to the situation presented by this case. Here, the Colorado Supreme Court evaluated the recommended findings of fact of the Hearings Panel, found them suppprted by clear and convincing evidence, and adopted them. We do not reach the question whether due process would have required a de novo hearing if the court had rejected or modified findings of fact based on contested credibility assessments.[6] *See Raddatz*, 447 U.S. at 681 n.7. We hold only that the Colorado attorney disciplinary scheme affords sufficient procedural safeguards to alert the supreme court to instances when it should exercise its discretion to conduct a de novo hearing and view the witnesses itself. *See id.* at 680–81.

The judgment is affirmed.

[6]We note that if the supreme court *rejected* a finding of fact as unsupported by clear and convincing evidence, the charges might in fact be dropped or sanctions reduced. Presumably, an attorney would not seek a hearing for review of that finding.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 82-Z-632

PETER S. RAZATOS, Plaintiff, v. THE COLORADO SUPREME COURT, P.V. HODGES, R.B. LEE, W.H. ERICKSON, L.D. ROVIRA, G.E. LOHR, J.E. DUBOFSKY, and J.R. QUINN, in their capacities as Justices of the Colorado Supreme Court, Defendants.	ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

WEINSHIENK, JUDGE

This case is brought pursuant to 42 U.S.C. § 1983. Plaintiff, a licensed attorney suspended from practice, is seeking a declaratory judgment that Colo.R.Civ.P. 252[1] violates the due process clause of the Fourteenth Amendment of the United States Constitution. He also seeks an injunction prohibiting the defendants from continuing the suspension of his license.

---

[1] **Rule 252. Proceeding Before the Supreme Court**

A. Caption. All disciplinary proceedings filed in the Supreme Court as herein provided shall be conducted in the name of the People of the State of Colorado and shall be prosecuted by the Attorney General of the State of Colorado.

In cases where the Hearings Panel has recommended discipline, it shall promptly file with the Clerk of the Court two copies of its report, findings, and recommendations; thereupon the matter shall be docketed by the Clerk as:

(Footnote[1] continued)

IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF COLORADO

No.....
ORIGINAL PROCEEDINGS
IN DISCIPLINE

vs.

. . . . . .
Attorney Respondent

The copy of the complaint previously filed together with the respondent's answer, the report, findings, and recommendations of the Hearings Panel, shall constitute the record in the case.

B. Citation - Exceptions Thereto - Acceptance. (1) Upon the docketing of said case in the Supreme Court as above provided, the Clerk shall issue a citation directing the respondent to appear within ten days and file his exceptions to said report, or his election not to do so as hereinafter provided. A copy of said report and citation shall be served on the respondent and proof thereof made in the manner as provided by Rule 248, supra.

(2) The respondent attorney shall, within ten days after acceptance of service, or service upon him of a copy of said citation and report, file with the Clerk of this Court five copies of:

(a) A statement that he does not wish to file exceptions to said report, findings, and recommendations; or

(b) His exceptions to said report, which exceptions shall, within thirty days thereafter, be supplemented by filing with the Court such portions of the Hearings Panel's records or the reporter's transcript as he may deem necessary to enable the Court to pass upon his exceptions. Requests for extension of time to obtain and file the transcript may be granted for cause shown.

(3) Upon failure of the respondent to file within ten days a statement or exceptions, the Court shall proceed to consider the recommendations of the Hearings Panel and may impose discipline in accordance therewith or such other discipline as it may deem proper and just. If the circumstances warrant, the Court may issue a citation for contempt, directing the respondent to show cause why he should not be adjudged in contempt and punished for failure to file a statement or exceptions as above provided.

(4) If the respondent attorney elects to file no exceptions, the Court shall fix a time and place for respondent's appearance for imposition of such discipline as the Court shall deem proper. The Clerk shall notify the attorney by registered or certified mail of the time and place of his appearance and the purpose thereof. The respondent shall appear in person and may be accompanied by counsel. Thereupon the Court shall impose such discipline as may be deemed proper and just.

(5) If the respondent files exceptions as above provided, the Attorney General shall, within ten days after the respondent has

Plaintiff's license was suspended by the defendants on June 22, 1981. The charges leading to the suspension were first heard by the three-member Hearings Committee, which recommended the three-year suspension. The findings and recommendation of the Committee were referred to the nine-member Hearings Panel, three of the members of the Panel being members of the Committee. The Panel approved the findings of the Committee, and drafted a report which was adopted by the defendants. The plaintiff's petition for rehearing was denied, and he appealed to the United States Supreme Court, which dismissed the appeal. *Razatos v. People, appeal dismissed*, 102 S.Ct. 1415 (1982).

The case is now before this court on defendants' Motion to Dismiss and on plaintiff's Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment. The issues have been extensively briefed by both sides and the Court is prepared to rule on these Motions. In his Motion for Summary Judgment, plaintiff asserts that there are no genuine issues of fact and that he is entitled to judgment as a matter of law. He claims that Colo.R.Civ.P. 252, which controls attorney

(Footnote[1] continued)

> filed such portions of the record or transcript as he deems necessary, lodge with the Clerk such additional parts of the Hearings Panel's records and the reporter's transcript as the Attorney General deems necessary to enable the Court to pass upon such exceptions.
>
> On the completion of the record as above provided, the respondent attorney shall have ten days within which to file a brief, the Attorney General shall have ten days after receipt of respondent's brief in which to file an answer brief, and the respondent shall have five days after receipt of the brief of the Attorney General to file a reply brief. Fifteen copies of each brief shall be filed. It may be typewritten, photocopied, or mimeographed.
>
> The Clerk of the Supreme Court, on request of the respondent, shall give to him an estimate of the cost of the original transcript of the record, or such portion thereof as he may designate, and on deposit with the Clerk of the Supreme Court of the estimated cost thereof, the Clerk of the Supreme Court shall promptly certify to the Court the record or parts thereof so designated.
>
> (6) The matter shall stand submitted upon the filing of the briefs as above provided or upon the failure of either the respondent attorney or Attorney General to file their briefs within the time provided, unless such time is extended by the Court, and the matter shall be promptly determined by the Court by an order imposing discipline or dismissing the complaint.

discipline proceedings, constitutes a denial of due process because the final arbiters of fact, the Justices of the Colorado Supreme Court, do not personally hear the testimony of the accused attorney or other witnesses.

In support of their Motion to Dismiss, the defendants put forward three grounds: (1) that the Court lacks original jurisdiction since the only forum for review of decisions of the Colorado Supreme Court is the United States Supreme Court; (2) that the Court lacks subject matter jurisdiction because the plaintiff has failed to raise a federal question; and (3) that the plaintiff has failed to state a claim upon which relief can be granted. The plaintiff argues that he is not attacking the constitutionality of Rule 252 as applied in his particular case, but is attacking the constitutionality of the rule as a whole. He asserts that this raises a federal question which was not decided by the United States Supreme Court in denying his appeal.

The Tenth Circuit in *Doe v. Pringle*, 550 F.2d 596 (10th Cir. 1976), addressed a similar claim by a plaintiff who claimed that the denial of his admission to the Colorado Bar was a violation of due process. The court in *Doe* drew the distinction between attacking a rule as applied to a particular plaintiff and attacking the rule itself. The plaintiff in the instant case attempts to rely on this distinction, urging that he is attacking the rule, rather than the Colorado Supreme Court's action pursuant to the rule in his particular case. The Court finds plaintiff's distinction to be unpersuasive because, as the court in *Doe* also found, plaintiff's action here is "in essence, an attempt . . . to seek review in inferior federal courts of the *entire* state proceedings, including the order of the Colorado Supreme Court . . . . That function is one reserved exclusively to the United States Supreme Court." 550 F.2d at 599. Plaintiff took his claim of due process violation to the United States Supreme Court and his appeal was denied. Now, he attempts to bring a similar action in the United States District Court by wording his claim as an attack on the rule rather than its application to him. In substance, he continues to appeal his suspension from the practice of law, and this he cannot do.

Even if the claim is properly before the Court on the grounds that it attacks the constitutionality of Rule 252 rather than Rule

252 as applied to the plaintiff, the Court finds the case of *Mildner v. Gulotta*, 405 F.Supp. 182 (E.D.N.Y. 1975), *aff'd*, 406 U.S. 901 (1975), to be persuasive in considering plaintiff's claim. In *Mildner*, the New York procedures for attorney discipline were attacked as being a denial of due process for the same reason that plaintiff here attacks Rule 252. In both the New York and the Colorado disciplinary proceedings, the body making the final decision does not hear live testimony. The court in *Mildner* held that it is *not* "constitutionally required that the . . . final arbiter of the facts have personally heard the accused attorneys or other witnesses . . . ." 405 F.Supp. at 195. It should be noted that *Mildner* was cited with approval in *Doe v. Pringle, supra,* as a case which reflects "a pronounced restriction of subject matter jurisdiction in the federal courts" in 42 U.S.C. § 1983 actions. 550 F.2d at 600. Therefore, even if plaintiff has framed his claim so that it raises a federal question, this Court agrees with the New York court and concludes that Rule 252 does not constitute a denial of due process.

Because original and exclusive jurisdiction over the discipline of attorneys lies with the Colorado Supreme Court, the United States Supreme Court being the sole forum for review, this Court does not have original jurisdiction over plaintiff's claim. In addition, plaintiff's assertion that he is raising a federal question is not persuasive, and, therefore, this Court does not have subject matter jurisdiction. Furthermore, Colo.R.Civ.P. 252 does not violate due process. For all of these reasons, it is

ORDERED that defendants' Motion to Dismiss is granted and that plaintiff's Motion for Summary Judgment is denied. It is

FURTHER ORDERED, in view of the above ruling, that Defendants' Cross Motion for Summary Judgment and Memorandum in Support Thereof and in Opposition to Plaintiff's Summary Judgment Motion and Memorandum, filed on October 19, 1982, is moot. It is

FURTHER ORDERED that the Complaint, Amended Complaint, and the cause of action are dismissed with prejudice, the parties to pay their own costs.

DATED at Denver, Colorado, this 21st day of October, 1982.

BY THE COURT:

/S/_____
ZITA L. WEINSHIENK, Judge
United States District Court

APPENDIX C

Rule 247. Formal Complaints — Notice, Process, and Service Thereof

A. All formal complaints seeking disciplinary action against an attorney shall be filed in quadruplicate with the Clerk of this Court. A formal complaint shall set forth the charges with sufficient particularity as to inform the respondent attorney clearly and specifically of the acts of misconduct with which he is charged. Formal complaints shall be filed with the Clerk of this Court.

B. Upon filing of a formal complaint, the Clerk of the Court shall issue a citation, together with a copy of the complaint attached thereto. The citation shall require said attorney within twenty days after service thereof to file with the Clerk of the Court an original and four copies of a written answer to the complaint. Such citation and complaint may be served by registered or certified mail, return receipt requested, addressed to the attorney complained of at his last registered or last known post-office address. "Return receipt" signed by the attorney complained of and returned to the Clerk of the Court shall be proof of service thereof.

In the event the attorney complained of shall refuse to accept said registered or certified mail and to sign a "return receipt" therefor, the citation and copy of complaint may be served upon him as other process and proof thereof made all as provided in Rule 4, C.R.C.P. Acceptance in writing of service by the attorney complained of shall constitute waiver of service and the time to answer shall commence to run from the date of such acceptance.

Rule 248. Answer—Contents Thereof

It shall be the duty of the attorney served with such citation to file with the Clerk of the Court, within the time specified, an original and four copies of his answer to the complaint in which he shall admit or deny the material allegations thereof, and set forth any affirmative defenses he may have. He may include in his

answer a request for a more particular statement of the alleged acts of misconduct, or raise any other objections, including a plea that the complaint does not charge misconduct warranting the imposition of any discipline.

If the attorney so charged, having been duly served with citation as above provided, shall fail to answer said complaint, as provided above, or fail to appear at the hearing, after receiving due notice of the time and place thereof, the panel to which the hearings function has been assigned (hereinafter in these rules referred to as "the Hearings Panel") may proceed to hear the same and make its findings and recommendations as hereinafter provided.

(Amended and effective January 9, 1975.)

Rule 249. Formal Hearings by Hearings Panel

All formal hearings shall be conducted by the Hearings Panel, a Hearings Committee consisting of at least three persons, composed of at least one member of the Hearings Panel and two or more members of the Bar, or a Hearings Committee composed of three or more members of the Hearings Panel. At formal hearings the witnesses shall be sworn and a complete record shall be made of all proceedings had and testimony taken. All such Hearings Committees shall be appointed by the Chairman of the Committee, and in appointing any such Hearings Committee, the Chairman shall designate one of the members thereof as the Hearings Chairman. At a hearing conducted by the Hearings Committee, the Hearings Chairman thereof shall act as presiding officer. He shall have authority to rule on all motions, objections, and other matters, presented in connection with such formal hearings.

Hearings on formal complaints shall be conducted in conformity with the Colorado Rules of Civil Procedure and the practice in the trial of civil cases except the respondent may not be required to testify over his objection.

Rule 250. Procurement of Witnesses—Contempt

A. **During Investigations.** In the course of investigations under Rule 246, the Chairman of the Committee, the Vice Chair-

man of an Inquiry Panel or the Committee Counsel in matters under investigation by the disciplinary staff, acting pursuant to and in conformity with these Rules, may administer oaths and affirmations and compel, by subpoena issued out of this Court and subject to the provisions of Rule 45, the attendance of witnesses and the production of pertinent books, papers and documents.

B. **During Formal Proceedings and Hearings.** In the course of proceedings under Rules 247 to 249 or under Rules 253 and 256, the Chairman of the Committee, the Vice Chairman of a Hearings Panel, or the Chairman of any Hearing Committee, acting pursuant to and in conformity with these Rules, shall have the power to:

(1) Administer oaths and affirmations and hear evidence.

(2) Compel, by subpoena issued out of this Court, the attendance of witnesses and the production of pertinent books, papers and documents.

Either party may, pursuant to and in conformity with these Rules, compel by subpoena issued out of this Court, the attendance of witnesses and the production of pertinent books, papers and documents before a Hearing Committee or for a deposition.

Every subpoena shall clearly indicate on its face that it is issued in connection with a confidential proceeding under these Rules and that it is contempt of the Supreme Court and grounds for discipline under these Rules for a person subpoenaed to in any way breach the confidentiality of the investigation. It shall not be regarded as a breach of confidentiality for a person subpoenaed to consult with an attorney.

Witnesses shall be entitled to receive fees and mileage as provided by law for witnesses in civil actions. Depositions may be taken by either party and used in the same manner and to the same extent as provided in civil actions. Subpoenas for attendance at depositions shall be issued out of the Court on behalf of either party and subject to the provisions of Rule 45.

C. **Contempt.** (1) Misbehavior of any person in the presence of any panel of the Grievance Committee while it is performing its official duties, or misbehavior so near thereto as to obstruct the Grievance Committee in the performance of its duties, or

resistance to any person with any lawful process, order or rule of the Grievance Committee shall constitute contempt.

(2) Any person subpoenaed to appear and give testimony or to produce books, papers or documents, who fails or refuses to appear or to produce such books, papers or documents or any person having been duly sworn to testify, who refuses to answer any proper questions, may be cited for contempt of this Court.

Any such person may be cited for contempt of the Supreme Court by the Hearings Committee or the Inquiry Panel. The Hearings Committee or the Inquiry Panel shall report in writing to the Court the facts relating to such contempt. Thereupon, proceedings before this Court shall be had as in cases of other civil contempts.

(Amended February 3, 1977, effective May 1, 1977.)

Rule 251. Report, Findings, and Recommendations of the Hearings Committee

A. At the conclusion of a formal hearing before a Hearings Committee, a report shall be made setting forth findings and recommendations, which report shall be signed by the majority of the Hearings Committee and submitted to the Hearings Panel for its approval or disapproval. To warrant a finding of misconduct, the charges must be established by clear and convincing evidence. If the findings and recommendations are approved and signed by the majority of the Hearings Panel, it shall be and become the report of the Hearings Panel. Where hearing is had before the Hearings Panel, it shall make a report of its findings and recommendations, which shall be approved and signed by a majority of the Hearings Panel.

B. If it shall be found that the charges are unfounded and unproven, the Hearings Panel shall enter its order dismissing the complaint, whereupon the matter shall be terminated; except that any person who has filed a complaint in the proceedings, who desires to have the matter of dismissal of the complaint reviewed by the Supreme Court, may petition the Court for such review. The petition shall state with particularity the facts which it is believed the Hearings Panel misapprehended or overlooked in

reaching its determination, with reference to the pages in the record which will support the petition. The petition shall be accompanied by a full transcript of the proceedings which shall be prepared at the expense of the party petitioning for review.

C. If the Hearings Panel finds the charges proven and recommends discipline, it shall also recommend the extent thereof as:

(1) Letter of admonition. If the Hearings Panel shall determine that a letter of admonition is the appropriate disciplinary action, it is not required to recommend such action to the Supreme Court but may instead prepare and transmit such letter to the respondent.

(2) Private censure;

(3) Public censure;

(4) Suspension for a definite or indefinite period;

(5) Disbarment.

D. In making any of the above recommendations, the Hearings Panel may take into consideration the respondent's prior disciplinary record. If the Hearings Panel does take into consideration any prior discipline of the respondent, its findings and recommendation shall so indicate.

E. In all cases the Committee may also recommend that the Court enter all additional appropriate orders including, without limitation, orders requiring respondent to pay the costs of the disciplinary action, to make restitution, and to make refund of moneys paid to respondent. A copy of the report, findings, and recommendations of the Hearings Panel shall be mailed to the complainant, the respondent attorney, and their attorneys of record.

Rule 252. Proceedings Before the Supreme Court

A. **Caption**. All disciplinary proceedings filed in the Supreme Court as herein provided shall be conducted in the name of the People of the State of Colorado and shall be prosecuted by the Attorney General of the State of Colorado.

In cases where the Hearings Panel has recommended discipline, it shall promptly file with the Clerk of the Court two

copies of its report, findings, and recommendations; thereupon the matter shall be docketed by the Clerk as:

IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF COLORADO

No.....
ORIGINAL PROCEEDINGS IN
DISCIPLINE

vs.

.....
Attorney Respondent

The copy of the complaint previously filed together with the respondent's answer, the report, findings, and recommendations of the Hearings Panel, shall constitute the record in the case.

B. **Citation - Exceptions Thereto - Acceptance.** (1) Upon the docketing of said case in the Supreme Court as above provided, the Clerk shall issue a citation directing the respondent to appear within ten days and file his exceptions to said report, or his election not to do so as hereinafter provided. A copy of said report and citation shall be served on the respondent and proof thereof made in the manner as provided by Rule 248, supra.

(2) The respondent attorney shall, within ten days after acceptance of service, or service upon him of a copy of said citation and report, file with the Clerk of this Court five copies of:

(a) A statement that he does not wish to file exceptions to said report, findings, and recommendations; or

(b) His exceptions to said report, which exceptions shall, within thirty days thereafter, be supplemented by filing with the Court such portions of the Hearings Panel's records or the reporter's transcript as he may deem necessary to enable the Court to pass upon his exceptions. Requests for extension of time to obtain and file the transcript may be granted for cause shown.

(3) Upon failure of the respondent to file within ten days a statement or exceptions, the Court shall proceed to consider the recommendations of the Hearings Panel and may impose discipline in accordance therewith or such other discipline as it may deem proper and just. If the circumstances warrant, the

Court may issue a citation for contempt, directing the respondent to show cause why he should not be adjudged in contempt and punished for failure to file a statement or exceptions as above provided.

(4) If the respondent attorney elects to file no exceptions, the Court shall fix a time and place for respondent's appearance for imposition of such discipline as the Court shall deem proper. The Clerk shall notify the attorney by registered or certified mail of the time and place of his appearance and the purpose thereof. The respondent shall appear in person and may be accompanied by counsel. Thereupon the Court shall impose such discipline as may be deemed proper and just.

(5) If the respondent files exceptions as above provided, the Attorney General shall, within ten days after the respondent has filed such portions of the record or transcript as he deems necessary, lodge with the Clerk such additional parts of the Hearings Panel's records and the reporter's transcript as the Attorney General deems necessary to enable the Court to pass upon such exceptions.

On the completion of the record as above provided, the respondent attorney shall have ten days within which to file a brief, the Attorney General shall have ten days after receipt of respondent's brief in which to file an answer brief, and the respondent shall have five days after receipt of the brief of the Attorney General to file a reply brief. Fifteen copies of each brief shall be filed. It may be typewritten, photocopied, or mimeographed.

The Clerk of the Supreme Court, on request of the respondent, shall give to him an estimate of the cost of the original transcript of the record, or such portion thereof as he may designate, and on deposit with the Clerk of the Supreme Court of the estimated cost thereof, the Clerk of the Supreme Court shall promptly certify to the Court the record or parts thereof so designated.

(6) The matter shall stand submitted upon the filing of the briefs as above provided or upon the failure of either the respondent attorney or Attorney General to file their briefs within the time provided, unless such time is extended by the Court, and the matter shall be promptly determined by the Court by an order imposing discipline or dismissing the complaint.

FILED
MAR 20 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1185 (2)

In The
Supreme Court of the United States
October Term, 1984

PETER S. RAZATOS,

Petitioner,

vs.

THE COLORADO SUPREME COURT, P. V. HODGES, R. B. LEE, W. H. ERICKSON, L. D. ROVIRA, G. E. LOHR, J. E. DUBOFSKY, and J. R. QUINN, in their official capacities as Justices of the Colorado Supreme Court,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DUANE WOODARD
Attorney General

CHARLES B. HOWE
Deputy Attorney General

RICHARD H. FORMAN
Solicitor General

RUTHANNE GARTLAND
First Assistant Attorney General
General Legal Services Section

Attorneys for Respondents

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: (303) 866-3611

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

14 pp

QUESTION PRESENTED

Does due process require a state supreme court when reviewing the findings and recommendations of a hearings committee in an attorney disciplinary proceeding to grant a *de novo* hearing whenever credibility of the witnesses is a crucial issue?

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 1

Rule at Issue 1

Statement of the Case 2

Summary of the Argument 3

Argument 4

Conclusion 8

TABLE OF AUTHORITIES

CASES

Califano v. Yamasaki, 442 U.S. 682 (1979) 7

Cardinale v. Louisiana, 394 U.S. 437, 439 (1969) 8

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 8

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 8

Mathews v. Eldridge, 424 U.S. 319, 335 (1976) 6, 7

People v. Razatos, 636 P.2d 666, 671 (Colo. 1981) 2

Razatos v. Colorado, 455 U.S. 930 (1982) 3, 8

Razatos v. Colorado Supreme Court et al., 549 F. Supp. 798 (D. Colo. 1982) 3

Razatos v. Colorado Supreme Court, 746 F. 2d 1429 (10th Cir. 1984) 3, 5, 6, 7

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

28 U.S.C. sec. 1254(1) (1982) 1

7 A Colo. Rev. Stat. 1, 4

Colorado Supreme Court Rules of Civil Procedure:

241.1-241.25 (Supp. 1983) 1

251 (1973) 4

252 ..... 1, 3, 4, 5, 8

252 (B) (3) and (6) 5

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 746 F.2d 1429 (10th Cir. 1984) and appears in the appendix to the petition at pp. A-1 to A-14. The opinion of the United States District Court for the District of Colorado is reported at 549 F. Supp. 798 (D. Colo. 1982) and appears in the appendix to the petition at pp. B-1 to B-6.

———o———

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on October 29, 1984, and the petition for certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1254(1) (1982).

———o———

RULE AT ISSUE

Rule 252, Colorado Rules of Civil Procedure (1973)

The text of rule 252, as well as that of other relevant rules, is set out verbatim in the appendix to the petition, pp. C-1 to C-7. (The rules were repealed effective January 1, 1982, and were replaced by rules 241.1 through 241.25. 7A Colo. Rev. Stat., Colo. R. Civ. P. 241.1-241.25 (Supp. 1983). The procedures, however, remain substantially similar.)

STATEMENT OF THE CASE

In the underlying disciplinary proceeding, petitioner Peter Razatos was charged with four counts of personal misconduct. A formal hearing on these charges was held before a three-member hearings committee pursuant to the rules adopted by the Colorado Supreme Court to govern the determination of complaints against attorneys licensed in Colorado. In the proceedings before the hearings committee, Mr. Razatos defended against the charges by contending that he was acting as a real estate broker and not as an attorney during the transactions in question. The committee found otherwise, and upon review of the record the Colorado Supreme Court concluded that this finding of the committee was supported by clear and convincing evidence. See *People v. Razatos,* 636 P.2d 666, 671 (Colo. 1981). In its decision, the state court concluded that although Mr. Razatos testified he was not acting as an attorney, the attorney-client relationship was established by the record, particularly through the testimony of Mr. Razatos' client and two attorney witnesses, through the conduct of the parties during the transactions, and the fact that Mr. Razatos filed an attorney's lien to recover fees for the services he rendered. *People v. Razatos, supra* at 671. After concluding that the hearing committee's findings on this issue and other material issues were supported by clear and convincing evidence, and that the recommendations for discipline were appropriate, the court adopted those recommendations without modification and suspended petitioner from the practice of law for a period of 3 years. *People v. Razatos, supra* at 667. Mr. Razatos appealed the state court's decision to the United States Supreme Court, which denied the appeal for

want of a substantial federal question. *Razatos v. Colorado,* 455 U.S. 930 (1982).

Petitioner thereafter filed a section 1983 action in the federal district court naming as defendants the Colorado Supreme Court and its justices. In his complaint Razatos sought a declaratory judgment that rule 252, Colo. R. Civ. P., denied him due process because the rule does not require the final arbiters of fact, the Colorado Supreme Court, to personally hear the testimony of the accused or other witnesses when the credibility of the witnesses is crucial to the decision. The district court dismissed the complaint for lack of subject matter jurisdiction and, alternatively, on the ground that rule 252 does not violate due process. *Razatos v. Colorado Supreme Court et al.,* 549 F. Supp. 798 (D. Colo. 1982). The United States Court of Appeals for the Tenth Circuit reversed the district court decision with respect to jurisdiction but affirmed on the merits. *Razatos v. Colorado Supreme Court,* 746 F.2d 1429 (10th Cir. 1984). Petitioner now seeks review of the decision of the United States Court of Appeals for the Tenth Circuit.

SUMMARY OF ARGUMENT

The Court of Appeals for the Tenth Circuit correctly determined that rule 252 of the Colorado Rules of Civil Procedure complies with due process standards. Furthermore, petitioner failed to raise his present challenge to rule 252 in the disciplinary proceedings before the Colorado Supreme Court and thus comity considerations dictate against federal court intervention.

ARGUMENT

A. The Court Of Appeals For The Tenth Circuit Correctly Determined That Rule 252 Of The Colorado Rules Of Civil Procedure Complies With Due Process Standards.

The Colorado procedures for the determination of a formal complaint against an attorney at all times relevant to this case were set forth in rules 241 through 259 of the Colorado Rules of Civil Procedure, 7A Colorado Revised Statutes (1973). These rules provide for a formal hearing before a hearings committee composed of three attorneys. The hearing is conducted in conformity with the practice in the trial of civil cases and a complete record is made of the proceedings. Colo. R. Civ. P. 249. To warrant a finding of misconduct the charges must be established by clear and convincing evidence. At the conclusion of the formal hearing, a report setting forth the committee's findings and recommendations is prepared and submitted to a nine-member hearings panel for its approval or disapproval. Colo. R. Civ. P. 251 (1973).

If approved by a majority of the panel, the findings and recommendations of the committee are adopted in the panel's report. When the panel decides to recommend discipline, it files its report, findings and recommendations with the Colorado Supreme Court. Colo. R. Civ. P. 252. The respondent attorney is provided an opportunity to file exceptions to the panel's report, after which the parties may designate portions of the record and file briefs. The matter then stands submitted to the court on the briefs and on the designated record. Colo. R. Civ. P. 252. The recommendations of the hearings panel are advisory

only, and the Colorado Supreme Court retains the power to increase or decrease the sanction or dismiss the complaint. Colo. R. Civ. P. 252(B) (3) and (6).

Petitioner asserts that rule 252 violates the due process clause because it does not provide for a *de novo* hearing when issues of credibility are dispositive. To meet constitutional standards, it is argued, the Colorado Supreme Court must personally observe the witnesses whenever the case turns on the credibility of the witnesses, even where the findings of the hearings panel regarding credibility are supported by clear and convincing evidence and accepted without modification.

The Court of Appeals for the Tenth Circuit held that notwithstanding the absence of express provision therefor in rule 252, the Colorado Supreme Court has the discretionary right to hold a *de novo* hearing whenever necessary to provide due process. *Razatos v. Colorado Supreme Court, supra,* 746 F.2d at 1434. The Court of Appeals did not reach the question of whether due process would have required a *de novo* hearing if the court had rejected or modified findings of fact based on contested credibility assessments, but held that the Colorado attorney disciplinary scheme affords sufficient procedural safeguards to alert the Supreme Court to instances when it should exercise its discretion to conduct a *de novo* hearing and view the witnesses itself. *Razatos v. Colorado Supreme Court, supra* at 1437.

Petitioner challenges this decision, arguing that the court of appeals erroneously "relied exclusively on this court's decision in *United States v. Raddatz,* 447 U.S. 667 (1980)," (petition, p. 6). Contrary to this assertion, the

Tenth Circuit's resolution of the due process claim proceeded not from the holding but from the type of analysis employed in *Raddatz,* which involved an examination of the three factors enunciated in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), as applied to the circumstances of this case. See *Razatos v. Colorado Supreme Court, supra* at 1435 through 1437.

In applying the *Mathews v. Eldridge* analysis, the Court of Appeals first considered the private interests implicated. The court recognized that attorney disciplinary proceedings involve an important liberty interest but found the due process rights of the attorney in such proceedings do not extend as far as the rights of an accused in a criminal case. *Razatos v. Colorado Supreme Court, supra* at 1435. Examining the second *Mathews v. Eldridge* factor, the Court of Appeals concluded that the attorney disciplinary procedures followed by the Colorado court were sufficient to protect against a possibly unreliable credibility assessment. Those procedures, the court noted, require a showing of clear and convincing evidence in a hearing before a hearings committee of fellow attorneys, a review of the hearings committee's findings by a hearings panel and also by the Colorado Supreme Court, and an opportunity for the attorney facing charges to file exceptions to the findings of fact, certify relevant portions of the transcript to the court, and extensively brief the issues. Finally the Court of Appeals concluded the state court has the discretion to order a *de novo* hearing when credibility determinations appear questionable. *Razatos v. Colorado Supreme Court, supra* at 1436. With regard to the governmental interests at stake and the burden imposed by additional safeguards, the Court

of Appeals emphasized the interests of a state in regulating lawyers and declined to rule that the state high court must conduct a *de novo* hearing in all cases where credibility of the witnesses is dispositive "in light of the substantial safeguards that currently exist." *Razatos v. Colorado Supreme Court, supra* at 1437.

In his petition for writ of certiorari, Mr. Razatos argues as he did before the Court of Appeals that this Court's decision in *United States v. Raddatz, supra,* is distinguishable from the case herein because of the interests at stake and because a criminal defendant has a second chance to suppress evidence at trial. These arguments were considered by the Court of Appeals in the course of its analysis. The Court of Appeals concluded, however, based upon its application of *Mathews v. Eldridge,* not simply upon a comparison of the *Razatos* case and the *Raddatz* case, that the Colorado procedures comply with due process standards.

In addition to relying upon *Raddatz,* as distinguished, petitioner contends that his position is supported by the case of *Califano v. Yamasaki,* 442 U.S. 682 (1979). Petitioner's reliance upon *Yamasaki* continues to be misplaced. That decision dealt not with the right to a hearing before the ultimate decisionmaker, but with the right to an oral hearing before an impartial factfinder prior to recoupment of social security overpayments. The Colorado disciplinary procedures are in full accord with the due process standards for an oral hearing discussed in *Yamasaki.*

B. Petitioner Failed To Raise His Present Challenge To Rule 252 In The Disciplinary Proceedings Before The Colorado Supreme Court And Thus Comity Considerations Dictate Against Federal Court Intervention.

Petitioner did not question the constitutionality of rule 252 when he was before the state supreme court or in his subsequent appeal to the United States Supreme Court. He waited until after the dismissal in *Razatos v. Colorado, supra* to raise the issue for the first time in the United States District Court. In *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983) this court noted "eminently defensible" policy reasons for disallowing a section 1983 claimant from litigating in federal court an issue the claimant elected not to raise during the state court proceedings. *Feldman, supra* at 484, n. 16; see also *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975). As this court stated in *Feldman,* the rationale behind federal restraint is that state courts are competent to adjudicate federal constitutional questions. If the state court has not been provided the first opportunity to act, the state is precluded from giving the statute a saving consideration in response to the federal constitutional arguments. *Feldman, supra* at 484, n. 16, citing *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969). This rationale should apply with even greater force when a 1983 litigant is seeking a writ of certiorari.

CONCLUSION

Petitioner seeks a determination that the final decision-maker in attorney discipline, and consequently other cases involving equivalent private interests, must conduct

a *de novo* hearing whenever it has the authority to conclude that there was not clear and convincing evidence to support the credibility findings of the trier of fact. petition, p. 10. Petitioner insists upon the right to a *de novo* hearing even in cases such as the present one where a full due process hearing has been provided and where the findings regarding credibility are supported by the record and adopted without modification. The holding of the Tenth Circuit Court of Appeals that the Colorado attorney disciplinary scheme affords sufficient procedural safeguards to alert the Supreme Court to instances when it should exercise its discretion to conduct a *de novo* hearing and view the witnesses itself does not satisfy petitioner; he would require an absolute right to a *de novo* proceeding in all cases where the credibility of the witnesses is a crucial issue. Petitioner's position, if correct, would render invalid the established procedure of review on the record and would impose an insurmountable burden upon an already over-burdened judiciary.

DATED this 18th day of March, 1985.

Respectfully submitted,

DUANE WOODARD
Attorney General

CHARLES B. HOWE
Deputy Attorney General

RICHARD H. FORMAN
Solicitor General

RUTHANNE GARTLAND
First Assistant Attorney General
General Legal Services Section
Attorneys for Respondents

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: (303) 866-3611